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ADRIAN RISKIN

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

CIVIL – UNLIMITED JURISDICTION

ADRIAN RISKIN,

Petitioner,

VS.

DOWNTOWN LOS ANGELES PROPERTY
OWNERS ASSOCIATION,

Respondent.

Case No.: BS174792

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO COMPEL PRODUCTION OF LIST OF WITHHELD DOCUMENTS

Motion Date: November 16, 2018

Time: 9:30 a.m.

Dept: 86

Judge: Hon. Amy D. Hogue

1 **I. INTRODUCTION**

2 This motion seeks an order in this California Public Records Act ("PRA") case requiring
3 Defendant/Respondent Downtown Los Angeles Property Owners Association (a.k.a. "Fashion
4 District BID," hereafter "Respondent" or "the BID") to provide a list of withheld and/or redacted
5 records. Unless the BID is compelled to produce a list of withheld records, Petitioner Adrian
6 Riskin will be required to brief this case, and the Court will have to decide it, without knowing
7 what documents (or even how many documents) the BID has withheld. Under such a regime,
8 Petitioner would have difficulty meaningfully contesting the BID's claim that each withheld
9 record was lawfully withheld subject to exemption. The BID should therefore be compelled to
10 provide such a list. *See, e.g., State Bd. Of Equalization v. Superior Court* (1992) 10 Cal. App. 4th
11 1177, 1993 [providing list of requested and withheld documents is "consistent with the language
12 and spirit of the Public Records Act."]; *see also ACLU of N. Cal .v. Superior Court* (2011) 202
13 Cal. App. 4th 55, 83 ["Because the agency has full knowledge of the contents of withheld records
14 and the requestor has only the agency's affidavits and descriptions of the documents, its affidavits
15 must be specific enough to give the requestor "a meaningful opportunity to contest" the
16 withholding of the documents and the court to determine whether the exemption applies."]

17 **II. STATEMENT OF FACTS**

18 Petitioner filed this case to secure Defendant/Respondent's compliance with three Public
19 Records Act requests for records. In response to three of the four requested items, the BID
20 indicated—at times vaguely—that it withheld responsive records under Cal. Gov. Code § 6255(a),
21 citing to the so-called "deliberative process privilege." (Declaration of Adrian Riskin filed
22 herewith ¶ 3 (hereafter "Riskin Decl.")). Each time Respondent claimed exemptions, Petitioner
23 requested additional information as to how specifically the cited exemption applied, but to no
24 avail. (Riskin Decl. ¶ 4.) Further, after filing suit, Petitioner requested that Respondent provide a
25 list of withheld and/or redacted documents; Respondent declined, and the parties met and
26 conferred to no avail. (Declaration of Abenicio Cisneros filed herewith ¶¶ 2-5 (hereafter "Cisneros
27 Decl.")) The requests are discussed in detail below.

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1 Request #1 – Communication with the South Park Business Improvement District and the
2 Downtown Los Angeles Neighborhood Council.

3 Petitioner requested, in Request #1, Item 1, all emails between Respondent and two
4 organizations, the South Park Business Improvement District and the Downtown Los Angeles
5 Neighborhood Council, during the period of January 1, 2016, through May 15, 2017. (Riskin
6 Decl. Ex. A.) Respondent produced a number of records, but did not indicate whether any records
7 were withheld subject to exemption. (Riskin Decl. ¶ 5.) When Petitioner inquired as to whether
8 records were withheld, Respondent declined to confirm, stating only, "[a]ll non-exempt records
9 have been submitted. Any exemptions are due to deliberative process." (Riskin Decl. ¶ 6, Ex. B.)
10 Despite Petitioner's repeated attempts to confirm whether records were actually withheld,
11 Respondent declined to confirm. (Riskin Decl. ¶ 7 and Ex. C.)

12 Request #2 – Communications with Urban Place Consulting (UPC).

13 Petitioner requested, in Request #2, all emails between Respondent (excluding executive
14 director Rena Leddy) and UPC from January 1, 2017, through the date of compliance with the
15 request. (Riskin Decl. Ex. A.) Initially, the BID stated that it determined the request "seeks some
16 records which are exempt from disclosure as deliberative process" but that it would produce non-
17 exempt records. (Riskin Decl. ¶ 8, Ex. D.) Petitioner requested additional information as to why
18 the privilege applied, but Respondent did not provide additional information. (Riskin Decl. ¶ 9,
19 Ex. E.) Finally, Respondent informed Petitioner that it was withholding all responsive records
20 subject to the deliberative process privilege. (Riskin Decl. ¶ 10, Ex. F.) Petitioner made an
21 additional attempt to obtain further clarification, but Respondent continued to refuse to provide
22 additional information. (Riskin Decl. ¶ 11, Ex. G.)

23 Request #3 – Board Member Linda Becker's emails.

24 Petitioner requested, in Request #3, all 2017 emails in the possession of BID Board
25 Member Linda Becker relating to the operation of the BID. (Riskin Decl. Ex. A.) Initially,
26 Respondent claimed responsive records did not exist. (Riskin Decl. ¶ 12, Ex. H.) When Petitioner
27 presented Respondent with evidence indicating otherwise, Respondent stated that it determined
28 Petitioner's request "seeks records exempt from disclosure pursuant to the deliberative process

1 privilege." (Riskin Decl. ¶ 13, Ex. I.) Petitioner requested additional information as to why the
2 privilege applied, but Respondent did not provide further information. (Riskin Decl. ¶ 14, Ex. J.)

3 Notably, the "deliberative process" privilege claimed by respondent is far from absolute.
4 "Not every disclosure which hampers the deliberative process implicates the deliberative
5 process privilege. Only if the public interest in nondisclosure clearly outweighs the public
6 interest in disclosure does the deliberative process spring into existence. The burden is on the
7 [one claiming the privilege to establish the conditions for creation of the privilege.]" *Citizens for*
8 *Open Government v. City of Lodi* (2012) 205 Cal. App. 4th 296, 306-07 [rejecting assertion that
9 deliberative process privilege applied]. In light of the conditional nature of the "deliberative
10 process privilege," the need for a list of withheld documents showing who communicated about
11 what, and when, is magnified in order to shed light on whether any documents can be withheld
12 on that basis.

13 Petitioner requested a list of withheld and redacted documents after filing suit;
14 Respondent declined to provide such a list.

15 To streamline this litigation and minimize its costs to the parties, Petitioner, through
16 Counsel, has made a good faith effort to obtain a list of withheld documents from Respondent
17 without the necessity of obtaining a court order. (Cisneros Decl. ¶¶ 2-5). Petitioner's counsel first
18 requested the list via email to Respondent's counsel on September 23, 2018. (Cisneros Decl. ¶ 2.)
19 In that email, Petitioner's counsel cited applicable case law and informed Respondent the list was
20 required to properly litigate this matter. (Cisneros Decl. Ex. A). After Petitioner sent two follow-
21 up emails, Respondent replied via email on October 5, 2018, informing Petitioner that it would
22 not provide the list as it believed it was neither "necessary" nor "appropriate" at the present time.
23 (Cisneros Decl. ¶ 3-4; Cisneros Decl. Ex. B.) The parties met and conferred on the matter via
24 telephone on October 10, 2018, with Respondent reiterating that it would not provide the list
25 without a judicial order. (Cisneros Decl. ¶ 5.)

26 **III. ARGUMENT: DEFENDANT/RESPONDENT SHOULD BE REQUIRED TO**
27 **PRODUCE A LIST OF WITHHELD AND REDACTED DOCUMENTS WHICH**
28 **COMPLIES WITH THE REQUIREMENTS OF A "VAUGHN INDEX."**

1 In order that Petitioner may have fair opportunity to litigate this matter, and that the court
2 may be sufficiently informed to adjudicate it, the court should order Respondent to prepare a list
3 of withheld and redacted documents. Such a list is known in federal open records law as a
4 "*Vaughn* index." Under federal precedent, the *Vaughn* index is a log which (1) identifies each
5 document withheld; (2) states the statutory exemption claimed; and (3) explains how disclosure
6 would damage the interests protected by the claimed exemption. *See Citizens Comm'n on Human*
7 *Rights v. FDA*, 45 F.3d 1325, 1326 n.1 (9th Cir. 1995). The description of the withheld material
8 should be sufficiently specific to permit a reasoned judgment as to whether the material is
9 actually exempt under the law. *See Founding Church of Scientology v. Bell*, 603 F. 2d 945, 949
10 (D. C. Cir. 1979).

11 The California Court of Appeal has held that preparation of a list of withheld and
12 redacted documents is "consistent with the language and spirit of the Public Records Act." *State*
13 *Bd. of Equalization v. Superior Court, supra*, 10 Cal.App.4th at p. 1193. The Court of Appeal
14 has further stated that, "[b]ecause the agency has full knowledge of the contents of the withheld
15 records and the requester has only the agency's affidavits and descriptions of the documents, its
16 affidavits must be specific enough to give the requester a meaningful opportunity to contest the
17 withholdings of the documents and the court to determine whether the exemption applies."
18 *ACLU of N. Cal. v. Superior Court, supra*, 202 Cal. App. 4th at p. 83.

19 Here, Respondent has cited alleged exemptions to withhold an unknown number of
20 records. Petitioner has made repeated attempts to gain clarity as to how many records
21 Respondent is withholding and as to how the cited exemptions might apply to the withheld
22 records. Despite those attempts, Respondent refuses to voluntarily provide the information
23 which Petitioner requires in order to have a meaningful opportunity to contest the withholdings.
24 As Respondent has refused to provide the required information voluntarily in response to
25 Petitioner's requests, it is appropriate that the court should order Respondent to do so.
26 Otherwise, the parties would be briefing, and the court would be deciding, this case in the dark.

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Dated: October 18, 2018


 ABENICIO CISNEROS
 Attorney for Petitioner/Plaintiff
 ADRIAN RISKIN